IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

PROBATE AND ADMINISTRATION DIVISION

CLAIM NO. SU2022ES01406

IN THE MATTER of MELVIN REID KINDNESS, late of Wiltshire and Sydney Cover in the parish of Trelawny, Deceased, Testate.

BETWEEN	**FAYE PATRICIA BOGLE**	**CLAIMANT**
AND	**ALDINGTON BRUCE MURRAY**	**DEFENDANT**

IN OPEN COURT

Ms. Nadine Lawson instructed by Mensa Legal Services appeared for the Claimant

Ms. Shawn Steadman instructed by Alexander Williams & Co. appeared for the Defendant

Heard: 20th, 21st, 22nd and 23rd January; 28th March; 2nd May and 8th May, 2025

Succession – Probate – Validity of a Will – Forgery – Fraud – Has the presumption of validity been rebutted – Revocation of a Grant of Probate – Is the absence of all the relevant parties material such that the matter cannot proceed – Is the principle of laches applicable – Joinder and Interested Parties – Is the Expert Report admissible – Should the Court pronounce for the force and validity of the Will – Wills Act sections 6 and 15 – Civil Procedure Rule 32.13 and 68.56

CORAM: A. MARTIN-SWABY J (AG)

"Probate actions are unlike other actions. They are meant to discern the true intentions of someone who is deceased and give effect to them if possible. Such actions occupy a special status."[1]

BACKGROUND

[1] These proceedings concern the Estate of the late Mr. Melvin Reid Kindness ("Mr. Kindness") who died testate on April 1, 2012. In this matter, the Claimant, Mrs. Faye Patricia Bogle, the sole child of Mr. Kindness and a beneficiary under his Estate, challenges the validity of a purported Last Will and Testament of Mr. Kindness dated January 15, 2006 ("Will 1") which was admitted to probate on August 27, 2013 and under which the Defendant, Mr. Adlington Murray was appointed as an executor.

[2] The essence of the Claimant's case is that Will 1 is invalid and ought to be revoked along with the Grant of Probate. In its stead, the Claimant seeks the reinstatement of the Last known Will and Testament of Mr. Kindness dated May 12, 1999 ("Will 2") which the Claimant argues immediately preceded Will 1 and is the sole, authentic and legally valid Last Will and Testament of Mr. Kindness. Surely, the reliefs sought, if granted, would have implications for the administration of the Estate of Mr. Kindness and the distribution of its assets.

THE CLAIM

[3] The Claimant has sought relief through filing a Fixed Date Claim Form on May 12, 2022 and which was Further Amended on December 6, 2022. The Claimant's claim is brought approximately 9 years after the Grant of Probate.

[4] In the Further Amended Fixed Date Claim Form, the following reliefs are sought:

1. *That this Honourable Court shall pronounce against the force and validity of the alleged last Will and Testament dated January 14, 2006, of the deceased Melvin Reid Kindness, and declare the same null and void for the reason that*

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[1] **Atchison v Inkster** (1983), 1983 CanLII 313 (BCCA)

the alleged Will is a forgery, as the signature thereon is not the signature of the deceased Melvin Reid Kindness.

2. *That the Probate of the alleged Will and Testament dated January 15, 2006 of Melvin Red Kindness, deceased, by this Honourable Court on the 27th day of August 2013 to Adlington Bruce Murray, Executor, of the said alleged Will in the estate of Melvin Reid Kindness, deceased, be called in and revoked.*

3. *That this Honourable Court shall pronounce for the force and validity of the last will and testament dated May 12, 1999 of the deceased Melvin Reid Kindness, being the script referred to in the Affidavit of Faye Patricia Bogle dated 10th day of May 2022 and filed on May 12, 2022, and a copy of which exhibited thereto, in solemn form, and direct that probate be granted to the Claimant Faye Patricia Bogle in Solemn Form.*

4. *Alternatively, an order that the Claimant be entitled to make an application for Grant of Probate of the Will dated the 12th day of May 1999, a photocopy which is marked "A", and annexed hereto as a true copy of the last Will and Testament of Melvin Reid Kindness in which the Claimant is a named beneficiary.*

5. *That the deceased Melvin Reid Kindness died testate and his estate is to be distributed in accordance with his last will and testament dated the 12th day of May 1999.*

6. *That in accordance with section 158 of the Registration of Titles Act, the Registrar of Titles be ordered to cancel the entries on the Duplicate Certificate of Title of the land registered at Volume 1077 Folio 58, transferring the property on transmission on August 16, 2016 and on transfer to Rosa-Lee Murray Kindness absolutely, under a grant of probate of the alleged forged will, representing a transmission from the estate of the widow of Melvin Reid Kindness, Rosa-Lee Murray Kindness, to whom the said land had been transferred upon probate of the alleged forged will, to one Brenda-Lee Curling.*

7. *That in accordance with section 158 of the Registration of Titles Act, the Registrar of Titles be ordered to cancel the Certificate of Title in respect of the land formerly registered at Volume 503 Folio 137 and now registered at Volume 1503 Folio 18, and issue a new title in the name of the Claimant and the estate of the widow of Melvin Reid Kindness, Rosa- Lee Murray-Kindness, as tenants in common in accordance with the will dated May 12, 1999 of Melvin Reid Kindness.*

8. *That the costs of this action be borne by the Defendant*

9. *That there be liberty to apply.*

[5] The Particulars of Fraud as contained in the Particulars of Claim filed on May 12, 2022 are as follows:

> a. *The Defendant had or did have in his possession a document alleging to be the purported last Will and Testament of the deceased which he knew or ought to have known was not a genuine Will of the deceased;*
>
> b. *The Defendant knew or ought to have known that the deceased did not make the purported Will nor authorize its making by or on his behalf;*
>
> c. *The Defendant, in probating the purported Will, has fraudulently misrepresented to this Honourable Court and the beneficiaries of the estate, that the purported Will was in fact that of the deceased;*
>
> d. *The Defendant perpetuated this fraud by his continued reliance on and utilization of the said Probate and purported Will to deal with the assets of the deceased in a manner prejudicial to the beneficiaries of his estate.*

[6] The Claimant asserts that the true wishes of Mr. Kindness upon death is not contained in Will 1 which was admitted to probate. Her case is that his intentions upon death are contained in Will 2 which was transmitted to her by Mr. Kindness in the year 2000. However, following the Grant of Probate, the Estate of Mr. Kindness has been substantially administered and with the death of his wife, Mrs. Rosa Lee Murray Kindness ("Mrs. Kindness") in 2016, who is a beneficiary under Will 1, property, that the Claimant now claims an interest under the Will 2, has been further administered by Mrs. Kindness' Estate.

[7] The Claimant's case is that Will 1 was procured by fraud and Mr. Kindness' signature was forged. Her case is that Mr. Kindness was blind at the material time and could not have signed Will 1. There is nothing in Will 1 which indicates that it was read over to Mr. Kindness. The attesting witnesses to Wil 1 gave evidence in this trial which indicated that Will 1 was not read over to Mr. Kindness before he signed the document.

DEFENCE

[8] The Defence was filed on November 17, 2022. The essence of the Defence is that at the time of signing Will 1 it is unknown to the Defendant as to whether Mr.

Kindness was blind. The Defendant was not present and was therefore unaware as to the state of Mr. Kindness' *"blindness or visual acuity and the Claimant is put to strict proof of same."* Further, that Will 1 has conformed to all other formalities, there was no misrepresentations made to the Court in probating Will 1 and as such no fraud was perpetuated as alleged by the Claimant or otherwise.

[9] The Defendant asserts that Will 1 is valid and the presumption of validity has not been displaced by the Claimant. His case is that fraud has not been proved to the requisite standard. The Defendant also urges this court to refuse the reliefs sought on the basis that the Claimant sat by and watched Mr. Kindness' Estate being administered. He further asserts that the Claimant, having become aware of Will 1 in the year 2013, she is barred by a probate doctrine of laches, which is a "cousin" of the equitable doctrine of laches. Additionally, the Defendant states that relief should not be granted as not all the relevant parties have been made interested parties in these proceedings.

THE EVIDENCE

The Claimant's Evidence

Dr. Valence Jordan

[10] Dr. Valence Jordan was called as the first witness in support of the Claimant's case. His Affidavit filed on November 3, 2023 was admitted as his evidence in chief. His evidence is that he is a Consultant Ophthalmologist and has been practising in Jamaica since 1994. He operates a private practise both in Saint James and Trelawny. Mr. Kindness was his patient for the period November 1995 until March 2004 (one decade). This would have been approximately two years prior to the execution of Will 1 in 2006.

[11] Mr. Kindness was being treated for glaucoma. Dr. Jordan's evidence is that on seeing Mr. Kindness in 1995, Mr. Kindness' left eye was blind as he could only see

hand movements at a distance of one foot from this eye. By 1997, the glaucoma started affecting the right eye which was also affected by cataract.

[12] Dr. Jordan's evidence is that by the year 2001, Mr. Kindness had reached the threshold of legal blindness. At that point, his visual acuity in both eyes was reduced to mere perception of hand movements, with the added complication of a cataract obstructing vision in the right eye. Dr. Jordan opined unequivocally that, in his professional view, an individual with such severely compromised vision would lack the functional capacity to read or meaningfully sign a document.

[13] A medical report was attached to this Affidavit and was identified as VJ1. This Medical Report includes details regarding Mr. Kindness' first attendance at the practise on the July 29, 1995 and which contained the above conclusion.

[14] In cross examination, Dr. Jordan indicated that the purpose of his treatment for Mr. Kindness was to decrease and maintain the pressure in his eyes within the normal range. He stated that there was improvement although there were times when the pressure was raised a bit outside of the normal range, in these instances he indicates that the medication would be adjusted. The issue with the pressure in the eye is that if it rises significantly, it can affect the functioning of the optic nerve thereby further deteriorating vision. He stated that he expected Mr. Kindness to improve over time.

[15] This prompted Counsel for the Defendant to ask the following question:

> ***Question:*** *The visual acuity can improve with patients like Mr. Kindness?*
>
> ***Answer:*** *No. In Glaucoma the vision that is lost is permanently lost but having said that you can have fluctuations if the pressure is not high and sustained. It can go down and come back up… let's say patient has a bad day vision can go down and up and you adjust the vision to get back to the norm for that patient…*

[16] The Court's understanding of his evidence is that even with the pressure fluctuations, the quality of vision remains at the patient's new normal where the pressure is effectively managed.

[17] Dr. Jordan conceded that his medical report did not expressly characterize Mr. Kindness as "legally blind." However, he noted that this conclusion was articulated in his sworn Affidavit. He clarified that, although the terminology was omitted from the report itself, the substance of his assessment of Mr. Kindness' visual acuity is encapsulated at paragraph 5 of his Affidavit, wherein he sets out the basis for his opinion with reference to the extent of Mr. Kindness's visual impairment. He states as follows:

"The clinical experience is that the difference between CF (counting fingers) and HM (hand movement) vision is noticeable for patients. In low vision clinic it is possible to enable patients to read words or letters if they can count fingers but next to impossible if the patients vision is only HM…"

[18] The Court notes that this paragraph was in the context of the doctor addressing the quality of Mr. Kindness' vision in 2001 which by then was limited to hand movements only in both eyes.

[19] When challenged regarding his findings in his report that a person with hand movement vision only cannot sign documents, Dr. Jordan indicated that he means that the person would be unable to sign to his (Dr. Jordan's) satisfaction. He explained that the signature would be all over "the shop" as in all over the place. He states that he could not speak to the state of Mr. Kindness' vision in the year 2006.

[20] During re-examination, Dr. Jordan clarified that his earlier assertion that it would be impossible for a legally blind individual to sign a document was intended to convey that any such signature would not be consistent with the individual's typical handwriting or signature. He further explained that the clinical definition of legal blindness encompasses individuals whose visual acuity is limited to finger counting at close range, or worse, where perception is confined solely to hand movements.

Ms. Faye Patricia Bogle, the Claimant

[21] The next witness was the Claimant herself, Ms. Faye Patricia Bogle. Her evidence in chief consisted of four affidavits. Her evidence is that in or around 1998, Mr. Kindness discussed with her his wishes upon death regarding the distribution of his assets.

[22] Following these discussions, in January 2000, Mr. Kindness sent to her by courier a document which was a copy of Will 2. This copy will is attached to the Affidavit of Testamentary Script of Faye Patricia Bogle filed on May 12, 2022 and sworn to on May 10, 2022. Contained in this Will are the following gifts and bequests.

a. *Lot 49 Wiltshire and Sydney Cove, Trelawny and registered at Volume 1077 Folio 58 to his wife Rosa Lee Murray – Kindness and his daughter Faye Patricia Bogle to hold as tenants in common.*

b. *Two parcels of land situated at Dromily in the Parish of Trelawny containing 3 acres and eight perches and registered at Volume 501 Folio 13 and four acres and eighteen perches and registered at Volume 560 Folio 85 and all motor vehicles to wife Rosa Lee Murray Kindness absolutely*

c. *Subject to a life interest being granted to wife Rosa Lee Kindness, I give and bequeath to use for agricultural purposes, his 13 acres and four perches of land part of Friendship Settlement, Trelawny registered at Volume 244 Folio 62 to daughter Faye Patricia Bogle for a period of fifteen years and thereafter to grandnephew Gawayne Kindness and Odayne Kindness absolutely; and 12 acres of land with shop situated at Dromily to nephews Donald Kindness and Grantley Kindness as tenants in common in equal shares.*

d. *All personal and real property which are not mentioned in the will to wife Rosalee Kindness and daughter Faye Bogle for the personal estate to be divided equally and for them to hold the real estate as tenants in common in equal shares.*

e. *In the event that wife predeceases him, all the estate which has been bequeathed to her is gifted to Aldington Bruce Murray, Kevin Murray and Cunliffe Curling for them to divide personal estate equally among them and to hold the real estate as tenants in common in equal shares.*

[23] Concerning her observations of the quality of Mr. Kindness' vision, the Claimant stated that on one of her visits to Jamaica in 1998, Mr. Kindness was driving her to look at some agricultural lands and she observed that he was driving very slowly and the car kept hitting the banking along the roadway. She noticed that on subsequent visits, he was being driven by his nephew Mr. Donald Kindness. The Court notes that the observations of the decline in the quality of his vision is consistent with Dr. Jordan who observed that in 1995 he was legally blind in one eye.

[24] Her evidence is that Mr. Kindness' visited the United States in 2002. When he arrived, the Claimant drove to her niece's house where Mr. Kindness was staying and took him to her house for dinner. She was shocked as to how poor his eyesight was. She had to lead him to the car, seat him in the car and fasten his seat belt. She had to even guide him as to the positioning of the food on his plate. He ate with a spoon as due to his poor vision he could not handle a knife and fork. She had to lead him to the bathroom and provide close assistance whilst he used the bathroom[2]. Again, this evidence supports the testimony of Dr. Jordan that by the year 2001, he was blind in both eyes.

[25] In the year 2005, this is the year before Will 1, the Claimant indicated that she visited Jamaica and a birthday party was held for Mr. Kindness. An invited guest at that party was Ms. Lurline Bowen-Mitchell, a neighbour of Mr. Kindness and also a witness in this case called by the defence. Whilst Mrs. Bowen-Mitchell was there at the party, both the Claimant and her mother had to assist Mr. Kindness in moving around as well as whilst he ate[3]. The Claimant states that Mr. Kindness' gait was also unsteady.

[26] After Mr. Kindness died, she had a brief conversation with Mrs. Kindness regarding his Will. However, she believed that the Will which was being probated was Will 2. She did not become aware of Will 1 until she was alerted to this by Mr. Donald Kindness. She also states that at no time did the executor of the Will 1 call her and advised her of the gifts she was to receive under the said Will. She indicates that she only learnt about the contents of the Will when she received a letter from Counsel, Mr. Herbert Hamilton, in September 2018.

[27] The Claimant contends that Will 1 contained significant changes to the disposition of Mr. Kindness' Estate. They are as follows[4]:

i. Volume 1077 Folio 58 "the Sydney Cove property" was given to Mrs. Bogle and Rosa Lee Kindness in equal shares under the 1999 Will. Under the 2006 will it was bequeathed to Rosa Lee Murray Kindness absolutely.

ii. Under the 1999 will, Volume 244 Folio 62 (Farm Lands) was bequeathed to Rosa Lee Kindness for the remainder of her life and then to Mrs. Bogle for 15 years and then to Gawayne and Odayne Kindness in equal shares. Under the 2006 Will, the life interest to Rosa Lee Kindness remained unchanged. However, upon her death, it was to be transferred to Mrs. Bogle and Norma Manning in equal shares.

iii. As regards the residual clause, under the 1999 will, such remaining real and personal property which is not mentioned in the will was to be given to Mrs. Bogle and Rosa- Lee Kindness. However, under the 2006 Will, the residue was given to Rosa Lee Kindness only.

[28] In cross examination, Counsel for the Defendant sought to challenge her evidence that she shared a very close relationship with Mr. Kindness. The Claimant maintained that although she left Jamaica in 1980, she returned almost every year especially to celebrate Mr. Kindness' birthday. Whenever she was not visiting, they exchanged letters. She stated that the last of such letters was sent from Mr. Kindness in the late 1980's. Counsel taxed her that none of these letters were

submitted to the Expert for analysis. The Claimant indicated that she did instruct her attorney to submit letters and she recalls submitting one such letter. However, no such letter was listed as being among the items which were submitted to the Expert for analysis.

[29] She admitted that Mr. Kindness did visit the United States and stayed with his niece, Norma Mullings, as opposed to her. The closeness of her relationship with Mr. Kindness was further called into question given this admission. However, the Claimant maintained that they had an excellent relationship.

[30] The Claimant was also confronted about her knowledge of Mr. Kindness' vision and also whether she was familiar with his signature. She stated that the signature on Will 1 is not Mr. Kindness' signature and further that she can say that he was blind because he could not drive or do his usual daily activities such as using the bathroom or cutting up his food.

[31] It was put to the Claimant in cross-examination that she had, in fact, received a copy of Will 1 as early as 2012, having obtained it from Mr. Donald Kindness. She conceded this point and accepted that her earlier assertion that she first became aware of Will 1 in 2018 upon receipt of correspondence from an attorney was inaccurate. She accepted that she was also a beneficiary under Will 1.

[32] In relation to Will 2, the Claimant accepted that none of the witnesses to this Will was deposed in this trial. She however states that she is sure that this Will reflects Mr. Kindness' true signature based on her familiarity with his signature.

[33] She stated that up to today (the date of cross examination), the police have not informed her of the outcome of the investigations regarding Will 1. She stated that one of the reasons why she has taken so long to bring this claim is because she was awaiting the police.

[34] In re-examination, she stated that she has made no contact with the executors of Will 2 nor the attesting witnesses as they are all deceased. However, there is no evidentiary material to support this.

Mrs. Beverly East

[35] Mrs. Beverly East was then called as the Claimant's third witness. Her Affidavit, filed on August 15, 2023 which exhibits her Expert Report which is dated September 24, 2020 were admitted as her evidence in chief. She was placed before this Court as a document examiner. Her evidence is that she received six (6) documents. These six consisted of five (5) documents which purport to contain known signatures of the deceased, and which were for comparison with a signature on a document purporting to be Will 1. The five (5) documents which were treated as known signatures are as follows.

- *K1. Last Will and Testament of Melvin Kindness dated May 12th, 1999, signed by Melvin Kindness;*
- *K2. Copy of Mr. Kindness's signature from updated Roll of Justices of the Peace for Trelawny July 10, 1979.*
- *K3. Transfer document dated 24th July 1978 signed by Melvin Kindness*
- *K4. Transfer document dated 12th December 1953 signed by Melvin Kindness*
- *K5. Copy of Mr. Kindness' signature from the Roll of Justices of the Peace for Trelawny (undated).*

[36] Her examination was aimed at determining whether the handwriting on the questioned document (Will 1) bears an authentic signature of Mr. Kindness. In Mrs. East's examination which was demonstrated in eight (8) graphics, she concluded that there were eight (8) inconsistent characteristics evident in the questioned signature as against the known signatures. Mrs. East made the following statement and the court accepts this. She stated as follows.

> *"In any signature there is a level of fluidity. It may go upwards or downwards. Very rarely does a signature which is authentic sits neatly on*

the line so person creating a signature that is not theirs needs the line to guide them. The questioned signature is very precise…."

[37] Her conclusion and opinion is that the questioned document (Will 1) did not bear an authentic signature of Mr. Kindness.

[38] In cross examination, Mrs. East agreed that it would have been better to have more recent signatures closer to when Will 1 was done. She accepted that she only had photocopied documents but indicated that it was not necessarily ideal that the examinations be done from original documents. Essentially, she maintained that once the documents were of a good quality then it is satisfactory. She stated that she did not examine the known signatures to ascertain how many natural variations were there between them. She agreed that the most recent known signature was a photocopy of a document made 26 years prior to the signing of Will 1.

Ms. Carmen Prout

[39] Ms. Carmen Prout's Affidavit filed on August 15, 2023 and sworn to on August 8, 2023 was admitted as her evidence in chief. No questions were asked of her in cross examination.

[40] Her evidence as contained in the Affidavit is that she is the cousin of the Claimant and that in the year 1999 she received a telephone call from the Claimant asking her to collect something from her father, Mr. Kindness. She went to Mr. Kindness' home as they lived in close proximity to each other and she retrieved the document and sent it via courier service to the Claimant. She indicated that she also retained a copy of what was transmitted and attached this copy to her Affidavit as CP1 which was identified as a copy of Will 2.

The Defendant's Evidence

Mr. Owen Herold Brown

[41] Mr. Owen Herold Brown is an attesting witness to Will 1. His evidence in chief is contained in his Affidavit filed on February 17, 2023 and sworn to on February 15, 2023. His evidence was that he attended Mr. Kindness' home on January 15, 2005 and while in the living room he saw Mr. Kindness sign Will 1. A copy of Will 1 was exhibited as OHB1. Mr. Brown identified Mrs. Lurline Bowen-Mitchell as being present and as being an attesting witness as well. He noted that Mrs. Kindness was also present and that he saw Mr. Kindness put on a pair of glasses before signing and that he did not appear to be blind.

[42] In cross examination, Mr. Brown states that he has lived at Sydney Cove, Wiltshire, Falmouth since the year 1978. He cannot recall when he first met Mr. Kindness. However, he met him through the Citizen's Association as Mr and Mrs Kindness were members of this association. He states that a day or two before January 15, 2006, he was invited by Mrs. Kindness to attend her house. She called him by telephone and asked him. To the best of his recollection, she asked him to come to witness the signing of a Will. He recalls going to the house but doesn't remember the time of day. However, he knows that it was a workday and it would have been before he went to work.

[43] On the day in question, Mrs. Kindness had let him in the house to a common area. When he arrived, Mr. Kindness was in the area where Will 1 was signed. He cannot recall if Mr. Kindness had anything in his hand. Mr. Kindness spoke to him about a Will and asked his wife for his glasses. His wife came with the glasses. This was a reading glasses. After Mrs. Kindness brought the glasses, Mr. Kindness signed the Will.

[44] Mr. Brown did not read the contents of the Will. However, he saw the caption at the front. He read the caption. The Will was four pages long and he signed on the fourth page. He admitted that the only page he read on the document was the page he signed. He glanced through the other pages but did not read the contents. Mr. Kindness did not read the Will aloud. He admitted that no one read the Will aloud.

[45] He recalls that when Mr. Kindness moved to the community, he drove. He says that no one assisted Mr. Kindness in signing the Will and no one pointed out to Mr. Kindness where he should sign. After the signing of the Will, he remained for about 10 minutes and spoke to Mr. Kindness. He indicated that he cannot say whether the document that is before the Court is the same document he had signed.

[46] During cross examination the following exchange took place:

> ***Question:*** *Are you aware that Mr. Kindness had problems with his vision?*
>
> ***Answer:*** *Not to the best of my knowledge.*

Mrs. Lurline Bowen-Mitchell

[47] The second attesting witness Mrs. Lurline Bowen-Mitchell was also called. Her Affidavit filed on February 17, 2023 and sworn to on February 15, 2023. It was received in evidence as her evidence in chief. In the Affidavit, she identifies herself as one of the attesting witnesses and indicates that Will 1 was signed by Mr. Kindness in her presence and the presence of Mr. Brown and Mrs. Kindness. She noted that he did not appear to be blind and was alert, wearing his glasses and well aware of what he was doing.

[48] Mrs. Mitchell was cross examined. She stated that she has lived at Sydney Cove, Wiltshire, Falmouth since the year 1993. She does not recall when she first met Mr. Kindness. However, she went to his house quite often as she lived one street away from him. She would visit about once per week. She knows that Mr Kindness used to drive when he came to Sydney Cove. However, she is not certain whether he was still driving when the Will was executed.

[49] She states that she remembers signing a paper at the Kindness's home. She is almost certain it was the same day, January 15, 2006. She states that Mr. Kindness had the paper there and he asked her to sign it. She states that he wrote the paper himself. She did not tell him what to do, all she did was sign it. She states that she read the paper. She did not check if the paper was long or short. What she knows

is that Mr. Kindness wrote and she signed it. She said that Mr. Kindness was not blind, deaf or demented.

[50] She states that Mr. Kindness wrote all of the paper himself. Mr. Brown was there as well. Both of them signed it at the same time. She emphasized that Mr. Kindness wrote the paper and then she read it. She indicated that the paper was in his handwriting because she could not write it for him. She said that she saw when he wrote the entire paper. She indicated that she thinks Mr. Brown read it as well. She reiterated that Mr. Kindness wrote everything on the entire paper, and he signed it.

Mr. Aldington Murray, the Defendant

[51] The Defendant's evidence in chief was extrapolated from his Affidavits sworn to on February 6, 2024 and July 24, 2023. He denies being involved in any fraud or forgery. He indicates that he was not present when the will was executed and only became aware that he was an executor after Mr. Kindness had died. He notes that he knows that Mr. Kindness lost his eye sight but that he does not know when this happened. He further indicated that he had no reason to read or review legal documents which contained Mr. Kindness' signature prior to the composition of Will 1.

[52] The Defendant noted that he was not present when Will 1 was being signed and therefore he has no reason to doubt the credibility of the attesting witnesses or to believe that Will 1 was forged or fraudulent and that he acted with "clean hands."

[53] In cross examination, the Defendant states that the property at Sydney Cove is owned by Brenda Lee Curling. Mrs. Kindness was his Aunt and she died in the year 2016. He stated that he relied heavily on attorney, Mr. Hamilton, to manage the probating of Will 1 and the administration of the Estate. He was living overseas and this was the first time he was functioning as an executor. He states that his father had several documents pertaining to Mr. Kindness' Estate but he does not know how he got those documents.

[54] He indicates that the property at Volume 1077 Folio 58 was left to Mrs. Kindness under Will 1 and to his knowledge, was given to her before she died. The three acres of land at Dromily registered at Volume 501 Folio 13 was also left to Mrs. Kindness and she received it before she died. The four acres at Dromily registered at Volume 560 Folio 85 was also gifted to Mrs. Kindness and he believes she also received that duplicate certificate of title before she died. As regards property at Volume 244 Folio 62 which was to be given to Fay and Norma Manning, he agreed that if this property is not yet transferred, the administration of the Estate is incomplete.

[55] He states that he was not the executor for his aunt's Estate and he has no direct knowledge whether her estate was fully administered. The extent of his knowledge regarding the latter is that both Estates used the same attorney.

[56] He states that he has never contacted Mrs. Bogle to indicate that she is a beneficiary under Will 1. In fact, he did not contact any of the beneficiaries. He doesn't recollect signing any documents transferring Volume 503 Folio 137.

[57] In answer to questions posed by the Court, Mr. Murray indicated that he cannot specifically say when Mr. Kindness began to lose his sight. He did interact with him face to face. He indicated that Mr. Kindness had challenges and had to be guided and helped when he visited Pembroke Pines, in the United States and stayed with his niece, as they had to make sure that he did not bump into anything

SUBMISSIONS

[58] The parties filed and exchanged written submissions. A summarized version of their submissions are reflected below.

The Claimant's Submissions

[59] Counsel for the Claimant, Ms. Lawson reviewed the evidence of the witnesses in this matter. She submitted that the witnesses for the Defendant were not credible and as such the presumption of validity was rebutted. She further submitted that

forgery and lack of capacity were supported by the independent medical and forensic evidence.

[60] Ms. Lawson argued that the Defendant's attempt to invoke latches was procedurally flawed because it was not pleaded by the Defendant in his defence, the Estate's administration is incomplete, no prejudice was shown to exist to the Defendant or the beneficiaries under the Will and lastly, the claim for revocation is legal in nature and not equitable and therefore laches could not apply.

[61] Ms. Lawson relied on the cases of **McElroy v McElroy [2023] EWHC 109** (Ch) **and Jennifer Dixon (Administrator Ad Litem of the Estate of Barrington Dixon, Deceased) v Angella Runte and Anthony DePaul [2017] JMSC Civ 114**, in support of her submissions.

The Defendant's Submissions

[62] Counsel for the Defendant, Ms. Steadman, also did a complete review of the evidence of the witnesses in her submissions. Ms. Steadman's submissions rested on two fundamental points. Firstly, that all the relevant parties are not before the Court. Ms. Steadman submits that this is essential. She argues that without the relevant persons, whom the orders sought would also affect, being before the Court, then the Court should not make an order which would affect those persons and their interests. Counsel relied on the cases of **Brown v Fender & Anor** (unreported), Court of Appeal, Jamaica, Civil Appeal No. COA2022CV00040, Endorsement read by V. Harris JA 13 December 2023, **Hugh Sam v Hugh Sam** [2018] JMCA Civ 15 and **Cespedes v Cespedes** [2020] JMSC Civ 94.

[63] Secondly, Ms. Steadman makes an argument about the delay between the time when the Claimant had knowledge of Will 1 and the time the claim was made. Counsel's submission questioned the Claimant's motive for challenging the validity of Will 1 and submitted that the claim should be dismissed based on the equitable doctrine of laches which bars the Claimant from bringing this claim. Counsel relied

on the case of **James v Scudamore** [2023] EWHC 996 (Ch) ("**Scudamore**") in support of her submissions that this claim is barred.

[64] Ms. Steadman also submitted that there is no merit to the claim and that Will 1 conforms to the Wills Act and is valid, that the presumption of validity has not been rebutted and that fraud has not been proven to the requisite standard.

ISSUES

[65] The submissions, particularly those for the Defendant brings into focus the following issues:

I. Is the absence of all relevant parties material such that the matter cannot proceed?

II. Is the principle of laches applicable?

III. Has the presumption of validity been rebutted?

IV. Should the Court pronounce for the force and validity of Will 2?

Issue (I) – Is the absence of all relevant parties material such that the matter cannot proceed?

[66] In the first issue counsel invited the Court to consider the cases of **Brown v Fender & Anor**, **Hugh Sam v Hugh Sam**, and **Cespedes v Cespedes.** The Court has considered the aforesaid authorities. The Court considers that none of these authorities concerned contentious probate proceedings and were therefore distinguishable from the case at bar. The procedure to be followed in contentious probate matters are found in Part 68 of the Civil Procedure Rules.

[67] Rule 68.56 of the CPR specifically addresses the issue of who must be made an interested party in the proceedings as well as who should be served or notified of the proceedings.

[68] Firstly, Rule 68.56(1) stipulates that in all proceedings regarding the revocation of a grant of probate, every person who is entitled or claims to be entitled to administer the estate must be made a party. In this case, by virtue of Will 1, two persons were named as executors. Mr. Adlington Murray, the Defendant, and Mr. Stanley Johnson. However, the latter renounced his executorship by executing a Deed of Renunciation and Disclaimer on June 27, 2012. This deed is exhibited to the Affidavit of Aldington Murray filed on July 28, 2023. Therefore, in this case, and by virtue of the Probate rules, the Defendant, Mr. Aldington Murray must be made a party to the Claim.

[69] Who must be served? Rule 68.56(1) indicates that where the Claim if brought by any person other than the executors, administrators or trustees, it must be served on the such categories of persons.

[70] Who should be notified? Rule 68.56(3) stipulates that the Claimant must give notice to every person who may be affected by probate proceedings, either as a beneficiary under a will in issue or under an intestacy, who is not joined as a party.

[71] Rule 68.56(4) states that the Court may direct –

a) That any person be joined as a party; or

b) That notice of the claim be given to any person.

[72] In this case, Counsel raised the issue of who should be made interested parties? The Probate rules do not require that all beneficiaries be made interested parties. However, they all must be notified.

[73] In examining the case management orders made in this matter, it is noted that on November 22, 2022, the Court ordered that the beneficiaries under Will 1 were to be notified of the proceedings. In compliance with this Order, Notices were filed in this court to Mr. Donald Kindness, Mr. Odayne Kindness, Mr. Grantley Kindness and Mr. Gawayne Kindness and Mrs. Norma Manning. Service of these Notices were proved and the matter was set for trial.

[74] This point was raised in limine on the morning of the trial. Should the Court have ordered that all the beneficiaries should be made interested parties? The view of the Court is that the probate rules do not require that all the beneficiaries are made parties to the action especially where the CPR permits Notice to be given of the proceedings and such Notice was given. It was incumbent on those relevant persons having received the Notice to bring an application for joinder, whether by way of intervention or to be added as a party or interested person to the proceedings, in accordance with the rights afforded to them under the law. Therefore, the matter at bar is distinguishable from those cases relied upon by Counsel for the Defendant. Accordingly, this is not a valid basis upon which to challenge the matter proceeding.

Issue (II) – Is the principle of laches applicable?

[75] The Court accepts that there is no time limit within which contentious probate proceedings ought to be initiated. However, in the circumstances where all civil proceedings are subject to the overriding objective to deal with cases justly as between parties, delay in embarking on such proceedings must be assessed in the context of achieving this objective.

[76] In this case, there has been a delay of 9 years in the filing of the Fixed Date Claim Form as the Claimant was notified of the Grant of Probate for Will 1 in 2013 and the claim was filed in 2022. Additionally, several things have occurred in terms of the administration of the Estate of Mr. Kindness since the issuing of the Grant of Probate and the initiation of these proceedings.

[77] For this reason, Ms. Steadman invited the Court to consider whether the equitable doctrine of laches applies to these proceedings. Further, in the event that the equitable doctrine does not apply, whether there is a probate doctrine of laches which applies to bar proceedings being brought where the delay is inordinate, inexcusable and the failure to intervene in probate proceedings resulted in persons operating to their detriment.

[78] Before examining **Scudamore**, it is important to explore the doctrine of laches. A definition of the equitable doctrine can be found in the decision of the Supreme Court of Canada in **Blundon v. Storm** [1971] S.C.J. No. 95. Therein, the court noted the following:

> *"The chief elements in laches are acquiescence and change in position on the part of the defendant. The doctrine is not susceptible of precise definition but the statements in Lindsay Petroleum Co. v. Hurd [(1874), L.R. 5 P.C. 221 at p. 239.] and Erlanger v. The New Sombrero Phosphate Co. [(1878), 3 App. Cas. 1218.] have had general acceptance. In Lindsay Petroleum (p. 239) it is said:*
>
> *'Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.'*
>
> *In commenting on this statement, Lord Blackburn in* ***Erlanger v. The New Sombrero Phosphate Co****., added the following:*
>
> > *'I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.'*

[79] Having outlined the definition of the equitable defence, it is important to explore its relationship, if any, to probate proceedings. **Scudamore** which involved a dispute

regarding the validity of a will which was admitted to probate, bears some similarity to the case at bar. However, there are distinct factual circumstances which warrant careful application of the decision.

[80] In **Scudamore,** the claimant, one of the deceased's sons, challenged the validity of a 2002 codicil to his late father's 1998 will, which had been admitted to probate in 2011 by the deceased's second wife, Christine. While accepting the will, the claimant contended that the codicil, which granted Christine an absolute interest in the matrimonial home rather than a life interest, was invalid due to procedural defects under the Wills Act, 1837. Allegations included that the codicil was signed by witnesses before the testator, on a different date, and potentially not by the testator himself, who was suffering post-stroke. Christine had since died, as had one witness, leaving limited direct evidence of execution. The claim was issued in 2020, years after legal advice had been sought in 2013. The defence raised procedural objections, asserted due execution, and invoked laches due to the claimant's delay. A third defendant took a neutral stance but required the claimant to prove his case.

[81] In that decision, HHJ Paul Matthews made the following pronouncements at paragraph 197 of the judgment and refused the orders sought. He states as follows:

> *"Accordingly, in the light of the authorities, I consider that the following propositions are warranted:*
>
> 1. *Where a person having a right to intervene in existing probate proceedings is aware of those proceedings and of that right, but deliberately abstains from joining in them, he or she is bound by the result: Newell v Weeks(1814) 2 Phill 224; Ratcliffe v Barnes (1862) 2 Sw & Tr 486; Young v Holloway [1895] P 87; Re Langton's Estate [1964] P 163.*
>
> 2. *Explicable delay, even when coupled with taking a legacy under a will proved in common form, is not generally enough to bar a claimant from taking probate proceedings: Bell v Armstrong (1822) 1 Add 365; Merryweather v Turner (1841) 3 Curt 802.*

3. *But unjustified delay, possibly on its own (see dicta in Merryweather v Turner at 813 and 814, and also now Wahab v Khan), and certainly when coupled with acts amounting to waiver of the claimant's right, will bar the claim: Hoffman v Norris (1805) 2 Phill 230n; Braham v Burchell (1826) 3 Add 243.*

4. *Similarly, where the delay has led to others' detrimental reliance on the inaction, such as distribution of the estate: Williams v Evans [1911] P 175.*

Whether the propositions at (3) and (4) should be referred to as a probate version of the doctrine of laches, or by some other name, does not much matter. In my judgment, however they are called, they represent the probate law applicable to this case.

[82] Counsel for the Claimant argued that laches was not specifically pleaded in the Defence and relied on **McElroy v McElroy** where there was a trial of the issue of laches as a preliminary objection had been taken. The facts of **McElroy v McElroy** are that the deceased died suddenly on February 18, 2011, some 5 months after his marriage to one Lynne McElroy. The latter obtained grant of administration in his estate on August 24, 2011. Thereafter, his estate was administered and the final estate accounts signed on April 9, 2012. On October 4, 2021, Paul McElroy, brother of the deceased issued a claim to have the grant of letters of administration revoked on the grounds that:

a. *Paul is the sole beneficiary of Ray's estate under a will dated 27 September 2002 ("the Will");*

b. *Unlike in England and Wales, under the law of Scotland a will is not revoked by a subsequent marriage;*

c. *At the dates of both his marriage to Lynne and his death, Ray was domiciled in Scotland;*

d. *Therefore, the validity of the Will is governed by the law of Scotland such that it was not revoked by Ray's marriage to Lynne and was valid at the date of Ray's death; and*

e. *Lynne obtained the letters of administration by making false depositions that Ray died domiciled in England and Wales intestate.*

[83] By consent, a trial was ordered to treat the with the preliminary issues of laches, estoppel and acquiescence. On the trial of these preliminary issues, the Court

ruled that the claim be dismissed due to the significant delay in the bringing of probate proceedings as well as the fact that the estate had been fully administered. The court did not find that the reasons for delay were sufficient and ruled that for it to hold otherwise would not further the overriding objective of dealing with cases justly.

[84] It is evident from the above decisions in the UK Supreme Court that the Courts there are seriously considering the prejudice which arises from delays in bringing contentious probate proceedings. I recognise that I am not bound by these decisions. However, Counsel appearing in this matter referred the court to consider the developments in the United Kingdom.

[85] In the case at bar, while there is indeed a delay of approximately nine years between the grant of probate in 2013 and the initiation of these proceedings in 2022, the Court cannot conclude that the Claimant's conduct amounts to inaction or acquiescence within the meaning of the relevant authorities. Unlike the claimants in **Scudamore** and **McElroy v McElroy**, who delayed for many years without taking concrete steps to assert their interests, the evidence in this case demonstrates that the Claimant took several affirmative steps during that period: she sought legal advice, reported the matter to the police, provided witness statements, engaged successive attorneys, and lodged a caveat. These actions reflect a continuous effort to address her concerns regarding the validity of Will 1, rather than the passive or knowing avoidance that underpins the doctrines of laches. Accordingly, this is not a case in which the Claimant sat by in silence while the Estate was administered without protest.

[86] Moreover, in both **Scudamore** and **McElroy v McElroy**, the issue of laches was clearly pleaded and formed the subject of preliminary or substantive judicial consideration. In contrast, in this matter, the Defendant did not plead laches in his Defence, but rather advanced it by way of submission at the close of trial. This procedural irregularity further weakens the persuasive force of the argument.

[87] I must also observe that the Estate remains partially administered, and accordingly, no prejudice has been demonstrated, nor is any reasonably apprehended, on the part of third parties as a result of the Claimant's delay. This is a material distinction from the authorities relied upon, in which claims were barred in circumstances where the estates in question had been fully administered and the delay had caused tangible prejudice to beneficiaries or personal representatives. In the present matter, no such prejudice has been established, either in fact or in law.

[88] Consequently, I find that the Claimant ought not to be barred from seeking the reliefs set out in her Fixed Date Claim Form. Her conduct does not amount to acquiescence or waiver, and the defence of laches, both procedurally and substantively, must fail.

Issue (III) – Has the presumption of validity been rebutted?

[89] The Claimant's main challenge to Will 1 is that it was forged or fraudulently obtained and therefore, the presumption of validity is rebutted.

[90] The starting point in a discussion regarding an allegation of fraud in the context of a Will is the presumption of validity which arises where, on the face of it, the Will conforms with the formalities provided for in section 6 of the Wills Act.

[91] In light of the evidence in this case, that Mr. Kindness was visually impaired, it is also important to consider whether there are additional requirements relating to due execution of a will in such circumstances.

[92] Firstly, in terms of the formalities in general, section 6 of the Wills Act provides:

> *"No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person, in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and subscribe the will in presence of the testator, but no form of attestation shall be necessary."*

[93] The presumption of validity was explained in Theobald on Wills, 19th edition 3-033 where it states:

> *"The presumption that everything was properly done (omnia rite et solemniter esse acta) arises whenever a will, regular on the face of it and apparently duly executed is before the Court and amounts to an inference, in the absence of evidence to the contrary, that the requirements of the statute have been complied with."*

[94] This presumption, like all presumptions is rebuttable. However, the authorities suggest that there is a requirement for the strongest evidence to be placed before the court to accomplish this task. The more serious the allegation of fraud, the more cogent the evidence needed to prove such fraud. In **Wright v Rogers** (1869) LR 1 PD 678 Lord Penzance stated as follows at p. 682:

> *"The court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause and signed by the testator, was not duly executed otherwise the greatest uncertainty would prevail in the proving of wills. The presumption of law is largely in favour of the due execution of a will, and in that light, a perfect attestation clause is a most important element of proof. Where both the witnesses swear that the will was not duly executed, and there is other evidence the other way, there is no footing for the Court to affirm that the will was duly executed."*

[95] However, where a testator is blind or illiterate, there are additional requirements. I have considered the matter of **In the Estate of Slidie Basil Joseph Witter** [2014] JMSC. Civ. 185, at para 18 where it is stated as follows:

> *[18] Even in circumstances wherein an attestation clause exists though, in a situation wherein the testator or testatrix, at the time of his or her execution of the will containing that clause, was then either illiterate or either partially or fully blind, for apparent reasons, the entire contents of that will must be read over to that testator or testatrix, before he or she is invited to execute same. Once such reading over has been done and the testator or testatrix has executed said will, at a place which is below the gifts and instructions therein, or is executed, 'at the foot or end thereof' (per section 6 of the Wills Act), then that form of execution will be deemed by a court as being entirely valid. See: Fincham v Edwards – [1842] 3 Curt. 63.*

[96] In **Fincham v Edwards** (1842) 163 ER 656, at p. 658 the Court stated:

> *"The will of a blind testator must be read over to him in the presence of witnesses, and the identical will must be read; in Williams on Executors*

> *(page 16, 2nd edit.) the rule is thus stated, "He that is blind may make a nuncupative testament by declaring his will before a sufficient number of witnesses; but he cannot make his testament in writing unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will; and, therefore, if a writing were delivered to the testator, and he, not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that if he should hear the same he would not own it. And it seems best that it be read over to the testator, and approved by him, in the presence of all the subscribing witnesses; and this the civil law did expressly require in the case of a blind man's will. But in England this strictness seems not to be precisely requisite, if there shall be otherwise satisfactory proof before the Court that the identical will was read over to him, although it was not in their presence."*

Factual Findings

[97] On the face of it, Will 1 as presented is presumed valid. However, having discussed the law in relation to the presumption of validity, the Court must now assess the evidence presented in this trial to determine whether this presumption has been rebutted.

[98] The Court cannot accept the evidence of Mrs. Lurline Bowen-Mitchell for several reasons. The Court considered her seniority and the lapse of time which may have had an impact on her memory. However, she spoke quite confidently of the things which transpired that day. Unfortunately, there are discrepancies in her evidence which go to the root of her credibility.

[99] Firstly, Will 1 is not handwritten, it is typed. The only handwriting seen on the paper are the signatures of the attesting witnesses and of the testator, Mr. Kindness. However, even if I were to credit her with the possibility of these discrepancies arising from a lapse of memory, the Court had serious concerns regarding her testimony about Mr. Kindness' vision. If she had seen him once per week and was so close to the family, how could she not notice that he was visually impaired? This concerns the Court greatly about the credibility of Mrs. Bowen-Mitchell. Even the Defendant himself, who lived in the United States of America and hardly saw Mr. Kindness gave evidence of his poor vision. Both attesting witnesses spoke of Mr.

Kindness as if he did not have challenges in his vision or as Mr. Owen Brown seems to posit, Mr. Kindness had put on what appeared to be his reading glasses.

[100] The Court found Mr. Brown's evidence to be of limited probative value and ultimately incapable of materially advancing the Defendant's case. While Mr. Brown claimed to have witnessed Mr. Kindness signing a document he identifies as being a Will by what appeared on the front page of the said document, he candidly admitted that he had not read the contents of this Will and was therefore unable to confirm whether the Will he attested was, in fact, Will 1 which he had exhibited to his Affidavit. Moreover, in light of the Court's findings based on expert medical testimony that Mr. Kindness was legally blind at the material time, Mr. Brown's assertions regarding the Mr. Kindness' visual capacity and his alleged ability to execute the will with precision and without assistance cannot be accepted as reliable.

[101] These factual findings, while significant, do not conclude the matter. The Court must still assess the Claimant's case as she must prove to the requisite standard that Will 1 is not valid.

[102] The Court accepts Dr. Valence Jordan as an expert witness being called in his capacity as an Ophthalmologist. I am satisfied on a balance of probabilities that Mr. Kindness was legally blind in both eyes by the year 2001. Further, that by 1995, Mr. Kindness was blind in the left eye and glaucoma had already started setting in the right eye. I accept that based on the condition of his vision in 2001, he would not be able to sign his name meaning his signature, as Dr. Jordan put it, "*would be slant and all over the place and would look nothing like his usual signature*". Dr. Jordan offered an independent perspective and I found him to be credible and reliable.

[103] I am mindful of the submissions of Counsel for the Defendant, Ms. Steadman, that the evidence of Dr. Jordan should not be accepted. She argues that the Medical Report is not in compliance with the rules of the CPR 32.13(3) as it failed to attach

any letter or instructions and failed to certify that no other instruction than those attached were given. Further, that Dr. Jordan indicated in his evidence that he did not know of the relevant rules but had inserted the clause because he was instructed to do so by the attorney who requested the report. Counsel relied on the cases of **Rowan Mullings v Joan Allen and Anor** [2012] JMSC Civ 167 and **Joan Allen and Anor v Rowan Mullings** [2013] JMCA App 22.

[104] In **Rowan Mullings v Joan Allen and Anor**, the case relied upon by Ms. Steadman, the application in question was made mid-trial and was refused, in part, due to non-compliance with procedural formalities. On appeal, in **Joan Allen and Anor v Rowan Mullings**, also cited by Ms. Steadman, the Court of Appeal set aside the decision of the Supreme Court. However, the appellate court's ruling did not rest on a finding that the formalities had, in fact, been satisfied. Rather, it turned on the conclusion that the trial judge had placed disproportionate reliance on factors that were not relevant, without giving adequate weight to the broader context and particular circumstances of the case.

[105] I accept that the relevant formalities of an expert report must be complied with. I do not however agree that the absence of these formalities should mean that the report is excluded, especially where previous unchallenged orders were made regarding the admissibility of said report.

[106] The Court's records reflect no objection filed in respect of the admission of Dr. Jordan's expert report. It is, however, acknowledged that the Claimant made an application prior to trial seeking orders to declare Dr. Jordan an expert witness and to admit his report as expert evidence. Those orders were duly granted. To the extent that any objection existed, it ought properly to have been raised at that interlocutory stage, and it is evident that if such objection had been made, it was overruled. The appropriate remedy for the aggrieved party would have been to pursue an appeal of that interlocutory decision.

[107] At the stage when the Medical Report of Dr. Jordan was admitted as an exhibit there was no objection by Counsel. It is well accepted that the absence of the contemporaneous objection must be taken as an acquiescence. Nonetheless, assuming that these objections are being made for the first time, the Court has considered them and is of the view that the Medical Report was duly admitted.

[108] Firstly, the Court notes Dr. Jordan's admission that he did not know the rules and only certified the report in keeping with the CPR because Counsel for the Claimant indicated that it must so be certified. I agree that it was incumbent on Dr. Jordan to have read the rules having been so instructed, but I am not of the view that the consequence of having not read the rules and not consciously knowing what the court expected of him as an expert means that his report should be excluded. These rules are in place to ensure the objectivity and impartiality of the expert witness and therefore in the absence of any evidence that Dr. Jordan was biased, the Court would not exclude his Medical Report. My decision is grounded in the words by the Court of Appeal in **Joan Allen and Anor v Rowan Mullings** at para 46, wherein it was stated:

> *[46] It is important that I address certain statements made by the learned trial judge with regard to the alleged potential lack of objectivity and impartiality of Mr Angulu.* ***It is entirely wrong to suggest and could be considered offensive to any serious professional that once having been contracted by a party to the action, he/she is likely to tailor his evidence to suit that party although having been accepted as an expert to the court. That suggests that professional persons without more, and without any specific evidence pointing in that direction would be without integrity and dishonest. I do not accept that at all and think that to the extent that that thinking may have influenced the learned trial judge in the exercise of his discretion, he would have proceeded with the wrong approach.*** *There is no doubt that the expectation is that the expert should provide independent and impartial assistance to the court within his expertise, and* ***it is that objectivity and expertise that the court should use as its test for the admissibility of expert evidence****.* ***[Emphasis Mine]***

[109] Further, in relation to the purported failure of the Medical Report to adhere to CPR 32.13(3)(a) and/or (c) which certainly goes again to the objectivity and impartiality of the expert, I am of the view that the above reasoning also applies.

[110] The court was sufficiently satisfied of the objectivity and impartiality of Dr. Jordan and for the aforesaid reasoning would not exclude the Medical Report. In any event, much of Dr. Jordan's oral testimony replicated the contents of his Medical Report.

[111] This means therefore, that the Court accepts that Mr. Kindness was legally blind at the time when Will 1 was executed. Having so found, the Court reviewed Will 1 which shows the purported signature of Mr. Kindness affixed to Will 1 with precision in an almost straight line. This Court cannot accept that someone who is severely visually impaired would be able to sign his name in an almost straight line without any assistance or direction as. This Court also accepts that Mr. Kindness would be unable to read the contents of the said Will to ensure that it reflects his true intentions prior to affixing his signature. To the naked eye, and as a fact finder, this Court cannot accept Will 1 as reflecting the true intentions of Mr. Kindness.

[112] Furthermore, in view of the authorities herein cited and the finding of fact that Mr. Kindness was significantly visually impaired, the Court is of the view that Will 1 is not duly executed. It was found on the evidence of the Defendant and within the contents of Will 1 that Will 1 was not read over to Mr. Kindness prior to him having signed it. Therefore, the Court finds that the Will does not comply with the additional formalities necessary where a testator is visually impaired.

[113] In these circumstances, the evidentiary foundation for the validity of Will 1 collapses. Therefore, this Court finds that the presumption of validity and due execution has been decisively rebutted, and accordingly, Will 1 must be deemed invalid.

Has forgery or fraud been proven to the requisite standard?

[114] While the above is sufficient for a finding that Will 1 is to be invalidated, there must be more to prove that there is fraud or forgery as it is the Claimant's case that Will 1 ought to be invalidated and the Grant of Probate revoked because there is fraud. Fraud or forgery must be proven on a balance of probabilities. However, it is a

higher balance of probabilities than that which is required for other civil actions such as negligence (see: **Ervin McLeggan v Daphne Scarlett and the Registrar of Titles** [2017] JMSC Civ 115 **and Paul Griffith v Claude Griffith** [2017] JMSC Civ 136).

[115] In **Halsbury's laws of England** Volume 12 (2009) 5th Edition paragraphs 1109 – 1836 explained the standard of proof. It is reflected as thus:

> *"… it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but that the gravity of the issue becomes part of the circumstances which the Court has to take into consideration in deciding whether or not the burden of proof has been discharged: the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."*

[116] The independent medical evidence and the factual evidence raises a strong inference that the signature placed on Will 1 could not have been so placed by Mr. Kindness as it appears to the naked eye of the Court to be precise and in a straight line. This means that it was either done by a third party or that Mr. Kindness' hand was guided by a third party to create the signature. This Court is satisfied that both actions fit within the definitions of forgery or fraud and therefore, the Claimant has discharged her burden of proof.

[117] While the Court expresses appreciation for the expert analysis provided by Mrs. East, it finds that her evidence adds little to what has already been firmly established on the basis of the independent medical evidence and factual evidence. Though the Court is of the view that the matter could be resolved at this juncture without need for further reliance on Mrs. East evidence, for fullness it has been addressed.

[118] Ms. Steadman did not want the court to accept the evidence of Mrs. East on the basis that photocopies were used and that they were not the best medium for comparison. She cited the cases of **Jackson v Powell & Ors** (unreported), Supreme Court, Jamaica, Claim No 2006 HCV 01431 delivered 21 May 2008, **Duncanson v Sharpe & Anor** [2023] JMSC Civ 34, **Winston Bloomfield v**

Markis West and Anor [2019] JMSC Civ 23 and **Joan Matheson v Donovan Lennox and Anor** [2016] JMSC Civ 188.

[119] In the authorities relied upon by Counsel, the rejection of expert handwriting evidence was not predicated solely on the use of photocopies, nor was it grounded in any rigid exclusionary rule concerning medium. Rather, in those cases, the expert evidence was found wanting in light of credible and compelling factual testimony that directly contradicted the expert's conclusions. Moreover, the courts found that the experts in question had failed to give adequate weight to material variances and contextual factors relevant to handwriting analysis. It is well accepted that handwriting analysis is not an exact science; its probative value must be assessed in light of the totality of the evidence.

[120] In furtherance of this objective, Counsel Ms. Steadman sought to challenge the nature and depth of the relationship between the Claimant and the deceased, Mr. Kindness ostensibly to question the Claimant's credibility and, more pointedly, to cast doubt on her ability to recognize and identify her father's signature. This issue is particularly relevant in light of the fact that the Claimant asserts she was able to recognize the signature on Will 1 as inauthentic and has relied upon that assertion to instruct her handwriting expert, Mrs. East. Counsel highlighted that, according to the Claimant's own evidence, the last signed letter she received from her father dated back to the 1980s, and she could not produce any additional correspondence bearing his signature. Although the Claimant stated that she submitted such a letter to Mrs. East, it was not listed among the five known signature documents relied upon in the expert's report.

[121] The implication raised by Counsel is that, at the time Will 1 was allegedly executed, the Claimant may not have had a sufficiently recent or reliable basis to identify her father's signature. In this regard, the quality of the Claimant's relationship with the deceased bears relevance not only to her credibility, but also to her familiarity with his habits, handwriting, a relevant consideration in cases where questions of forgery arise; and the veracity of the expert evidence.

[122] It is indeed curious that the purported letter containing the father's signature was not among the expert's sample set, and the Court finds this unexplained omission troubling. That said, I do not consider it sufficient to discredit the Claimant. Ms. Steadman did not put this omission squarely to Mrs. East in cross-examination, nor did she elicit from her whether such a document had been submitted but ultimately excluded due to quality or duplication. In the absence of such clarification, this Court will not engage itself in speculation.

[123] It is also noted that the known signature documents examined by Mrs. East were dated and largely historical, with the most contemporaneous specimen being the signature affixed to Will 2, executed in 1999. I am reminded that Mrs. East indicated that she had not examined whether there were variations between the known signatures. My understanding is that Mrs. East did not identify whether the known signatures were likely authored by the same person, being Mr. Kindness. This would be a strong and compelling argument upon which to reject the evidence of Mrs. East.

[124] However, and perhaps most importantly, the validity of Will 2 has not been challenged, nor has any evidence been presented to suggest that the signature thereon is not that of Mr. Kindness. The evidence of Ms. Carmen Prout is unchallenged and she was the sole witness brought to speak to the provenance of Will 2. I accept Ms. Prout's evidence. The implication of this finding in the overall context of the claim will be discussed later. The conclusion of Mrs. East however, is relevant as it says that the signature on Will 1 is not authored by the persons who authored the signatures on any of the known signatures she has received which includes the signature on Will 2.

[125] In the present matter, when the totality of the evidence is considered, the Court finds no reason to reject Mrs. East's evidence, particularly when considered alongside the expert medical opinion of Dr. Jordan and against the backdrop of the Defendant's case, which was marked by credibility deficits and material inconsistencies.

[126] In disposing of this issue, I have considered the fact that the Estate has been significantly administered in the following way:

i. Regarding Volume 1077 Folio 58 “the Sydney Cove property” which was given to Mrs. Bogle and Rosa Lee Kindness in equal shares under the 1999 Will. As stated earlier, under the 2006 will, it was bequeathed to Rosa Lee Murray Kindness absolutely. **This property now vests in Brenda Lee Curling by virtue of the administration of the estate of Mrs. Kindness – that is endorsed on Certificate of Title.**

ii. Regarding Volume 244 Folio 62 (Farm Lands), under the 1999 Will, it was to be bequeathed to Rosa Lee Kindness for the remainder of her life and then to Mrs. Bogle for 15 years and then to Gawayne and Odayne Kindness in equal shares. Under the 2006 Will, the life interest to Rosa Lee Kindness remained unchanged**. The is property has not been administered.**

iii. As regards the residual clause, under the 1999 will, such remaining real and personal property which is not mentioned in the will was to be given to Mrs. Bogle and Rosa- Lee Kindness. However, under the 2006 Will, the residue was given to Rosa Lee Kindness only.

[127] It is a well-established principle that where a Will is invalidated based on fraud or forgery and such fraudulent Will was admitted to probate and the Estate Administered, equity will not permit that fraud to stand, even if assets have changed hands. As long as the estate is not fully administered, and the assets are traceable, the Court retains jurisdiction to grant effective and restorative relief**.** Any remedy that upholds a forged or fraudulent Will would be a denial of justice.

[128] In the matter at bar, the Estate is not fully administered and both parties have adduced evidence regarding the status of the distributed assets. The Court is satisfied, on the basis of that evidence, that the assets in question are identifiable and traceable**,** notwithstanding the passage of time. In these circumstances, this

Court is of the view that it may grant the Orders sought at paragraphs 1 and 2 of the Further Amended Fixed Date Claim Form.

Issue (IV) – Should the Court pronounce for the force and validity of Will 2?

[129] As a matter of legal consequence, the Will immediately preceding Will 1 ought to be the Last Will and Testament of Mr. Kindness. This is so identified by the Claimant as being Will 2. There was no challenge to Will 2 being so designated by any of the notified beneficiaries under Will 1 or the Defendant himself. Further, there was no challenge to the validity of Will 2.

[130] While the Court is of the view that the signature appearing on Will 2 appears to be valid and authentic, it must nonetheless approach the question of relief, specifically in relation to Orders 3 to 5 of the Further Amended Fixed Date Claim Form ("the remaining orders"), with fresh and independent scrutiny. The Court has concern regarding the absence of the original of Will 2, as only copies were exhibited during the proceedings.

[131] In the Court's view, the Claimant's claim is properly understood as having two distinct limbs: (i) to obtain a declaration that Will 1 is invalid, thereby revoking the Grant of Probate issued in its favour; and (ii) to secure a declaration that Will 2 is valid and to be given a grant of representation for same. This means that if Will 1 is found to have been fraudulently created or improperly admitted to probate, the Court must still be satisfied that Will 2 is the last valid Will executed by Mr. Kindness immediately prior to the invalid instrument. Therefore, limb (ii) is not automatically given upon proving limb (i).

[132] Additionally, the Court also observes that the Orders seek to have the Claimant appointed as an executor of Will 2 and be granted Probate on that basis. However, as a matter of law, I am not convinced that such a course is permissible. My understanding is that where the named executors have died after the testator, the appropriate legal procedure is for beneficiaries under the Will to apply, in accordance with the established order of priority, for a Grant of Administration with

the Will Annexed. In such cases, the applicant would be appointed as administrator, not executor, and would be authorized to administer the estate in accordance with the terms of the Will.

[133] Therefore, the Court is invited to consider whether it may nonetheless pronounce upon the authenticity and validity of Will 2 and permit the Claimant to apply for a Grant of Administration with that Will annexed.

[134] It bears emphasis that the validity of Will 2 has never been contested; no party disputes that it was duly executed and effective prior to the later instrument. Accordingly, there is no need to undertake a solemn-form proof of Will 2's execution as its authenticity stands unchallenged and solemn-form proof is required where the validity is the subject of contentious proceedings. The sole battleground has been the legitimacy of Will 1, which the Claimant has proven invalid. Had the Defendant wished to uphold Will 1, it was incumbent upon him to prove it in solemn form and affirmatively challenge Will 2's invalidity. In the absence of any such challenge, the Claimant need only demonstrate that Will 2 existed as the last valid testament before the void instrument and that the copy before this Court accurately reflects the original.

[135] Will 2 in the Court's view is only invoked here to secure administration of Mr. Kindness's estate under its terms; its validity is unchallenged and thus requires no solemn-form proof. Even if Will 1 had been invalidated without Will 2 being brought into focus, beneficiaries or legal representatives would still have been obliged to pursue the proper grant, whether under intestacy rules or, as is permissible here, by proving the copy Will and applying for administration with that copy annexed. Accordingly, this Court's task is not to pronounce Will 2 valid in solemn form, but simply to declare that the copy before us is a true replica of the original and to grant the Claimant leave to apply for a Grant of Administration with that copy annexed.

Has the copy will been proven?

[136] The Court is cognizant that these are not the Orders sought in the Further Amended Fixed Date Claim Form, and had invited oral submissions on May 2, 2025 on the above as it was not addressed in the written submissions which were filed by Counsel in the matter. I wish to again thank Counsel for these submissions which have assisted me greatly

[137] These are the Orders to which this discussion relates:

> *3. That this Honourable Court shall pronounce for the force and validity of the last will and testament dated May 12, 1999 of the deceased Melvin Reid Kindness, being the script referred to in the Affidavit of Faye Patricia Bogle dated 10th day of May 2022 and filed on May 12, 2022, and a copy of which exhibited thereto, in solemn form, and direct that probate be granted to the Claimant Faye Patricia Bogle in Solemn Form.*
>
> *4. Alternatively, an order that the Claimant be entitled to make an application for Grant of Probate of the Will dated the 12th day of May 1999, a photocopy which is marked "A", and annexed hereto as a true copy of the last Will and Testament of Melvin Reid Kindness in which the Claimant is a named beneficiary.*
>
> *5. That the deceased Melvin Reid Kindness died testate and his estate is to be distributed in accordance with his last will and testament dated the 12th day of May 1999.*

The Claimant's Submissions

[138] Counsel for the Claimant, Ms. Lawson, conceded that the relief sought under Orders 3 and 4 of the Fixed Date Claim Form cannot stand as presently drafted. Under the Civil Procedure Rules, only a person named as executor in a valid Will may apply for a Grant of Probate. In the event those executors are unable or unwilling to act, the entitlement passes in strict order of priority to residuary legatees. Although the Claimant asserted in evidence that the original executors and attesting witnesses to Will 2 have died, she adduced no admissible proof of their deaths, nor did she establish the precise order of entitlement ahead of her.

[139] Recognising this procedural hurdle, Ms. Lawson invited the Court to grant the Claimant leave to apply instead for Grant of Administration with the Will annexed. That route, prescribed by the Civil Procedure Rules, would permit the Registrar to

consider fuller evidence thereby confirming deaths of prior grantees, clearing the line of succession, and, if satisfied, vesting administration powers on the Claimant in accordance with the terms of Will 2.

[140] Turning to Will 2 itself, Ms. Lawson urged the Court to invoke Rule 68.17 of the CPR, which allows proof of a Will from a copy when the original cannot be located. To succeed, the applicant must satisfy the Court, on the balance of probabilities, that the instrument existed at the testator's death and was not deliberately destroyed by him with intent to revoke. Ms. Lawson submitted that, although the original was lost, likely during the testator's final years in a care facility while legally blind from 2001, there remains strong inferential evidence that it was duly executed and preserved until his death.

[141] In that regard, Ms. Lawson asked the Court to note the striking similarity between several clauses of Will 2 and those of the subsequently executed Will 1. Such overlap, she argued, supports the inference that the drafter of the later instrument had access to the earlier one. Moreover, the testator's deliberate act of transmitting a copy of Will 2 to his daughter, despite his significant visual impairment, demonstrates both his intent to rely upon that document and his care in safeguarding his testamentary wishes.

[142] Finally, Ms. Lawson reminded the Court that in these circumstances there arises a presumption of due execution. In these circumstances, there is no requirement for attesting witnesses to testify as to whether the formalities are satisfied. In her submission, the copy presented here meets those formal requirements and, absent any credible challenge, should be accepted as prima facie evidence of the testator's genuine intentions, subject only to the Claimant's forthcoming application under Rule 68.17.

The Defendant's Submissions

[143] In response, Ms. Steadman stated that there is no evidentiary material that is capable of satisfying the Court as to the due execution and authenticity of the

original Will 2. There is no evidence concerning an original will. The evidence of the Claimant is that her father sent her a copy Will and one year later in a supplemental affidavit, the Claimant stated that her cousin, Mrs. Prout, sent it to her.

[144] Ms. Steadman stated that the fact that the testator himself sought to execute Will 1 means that there was an intention to revoke Will 2. She invited the court to consider the calibre of persons chosen by the testator as attesting witnesses: a retired nurse and a Justice of the Peace. She argued that even if the Court rejects Will 1, the Court must consider the actions of the testator in calling two reputable persons from the community to execute the said Will.

Discussion

[145] I will now turn to the law. The starting point is section 15 of the Wills Act. It reads as follows:

> *"No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by any other will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."*

[146] Based on the above, revocation arises in two circumstances either through the execution of another Will or codicil which is executed in accordance with the law or by its physical destruction with an intention to revoke held by the testator.

[147] Having determined that Will 1 is invalid, it follows that it cannot have operated to revoke an earlier testament. There is no evidence of any other Will of Mr. Kindness as having existed before Will 1, except copy Will 2. In law, a later will only revokes an earlier one if it is itself validly executed. Will 1 fails that threshold, therefore, Will 2 remains, by the evidence, the last Will executed by Mr. Kindness, at least in principle. In practice, however, the Court has not seen the original of Will 2; only photocopies have been produced.

[148] Where an original will cannot be produced because it is truly lost or misplaced, the Civil Procedure Rules and common law afford a path for proving its validity from a copy. Absent such proof, the law presumes that the testator, having had the original in his possession, intentionally destroyed it with the purpose of revoking it. This presumption is rebuttable, but the burden rests on the claimant to present clear and convincing evidence that the original was not destroyed intentionally. In the present case, the Claimant must therefore satisfy the Court that the copies before us faithfully reflect an authentic, duly executed Will 2 that survived until Mr. Kindness's death.

[149] To do so, the Claimant must bring evidence before this Court which shows that the original Will 2 was last seen in Mr. Kindness's custody, the confirmation of witnesses as to its execution and efforts of diligent searches. Had the Court been provided with the original this would be wholly unnecessary.

[150] The Court must now consider whether it is satisfied that the copy document provided being purported to be Will 2, has not been revoked through physical destruction with an intention to revoke held by Mr. Kindness.

[151] **Theobalds on Wills**, 13th edition at page 172 states as follows:

> *"A will or codicil left in a testator's possession and not forthcoming at his death, must in the absence of evidence to the contrary, be presumed to have been revoked, But the contents of the will and the declarations of the testator down to his death are admissible in evidence for the purposes of rebutting this presumption. A different rule applies if the testator has been affected by mental illness after the execution of the will."*

[152] In relation to the approach to be taken to the presumption, Theobalds referred to the case of **In the estate of Yule** (1965) 109 S.J. 317, where Wrangham J is reported as saying:

> *"It was clear from the older authorities that those presumptions were not intended to be regarded as rigid statutory rules, when they would produce absurd results, but as indications of the inferences which would always be drawn by the court from a given state of evidence.* ***The court would approach the question by considering what was the most probable***

> ***<u>explanation of the absence of the will on the testator's death</u>***." *[my emphasis]*

[153] The principles which guide in both appreciating the scope of the presumption and applying it to a particular case was summarized in the case of **Jones v Tracey and Ors** [2023] EWHC 2242 Ch at paragraph 19 of the judgment where the learned judge summarizes Williams and Mortimer on Wills as follows:

> *"(1) If a will was last traced to the possession of the testator and is not forthcoming on his death, there is a prima facie presumption in the absence of circumstances attending to a contrary conclusion that the testator destroyed it with the intention to revoke it.*
>
> *(2) The presumption may be rebutted. It has been suggested in one case that the evidence needs to be "clear and satisfactory", but I do not consider that this gloss adds anything to the usual requirement that the court must be satisfied on the balance of probability by the evidence before it. Either the evidence taken as a whole achieves the outcome of rebutting the presumption or it does not. Obviously, evidence that is unclear or unsatisfactory, or both, is unlikely to satisfy the court*
>
> *(3) Both Williams on Wills and Williams, Mortimer & Sunnucks provide examples of the type of evidence the court may take into account. These examples are only of passing interest because each case necessarily involves a careful review of the circumstances in which the last will, and possibly earlier wills, were made, the will-maker's intentions and relevant events through the will-maker's life up to the will-maker's death. The character of the will-maker and their lifestyle may also be relevant. It is unlikely that the facts of an earlier case will precisely map onto the case under consideration.*
>
> *(4) The burden of proof lies upon the party seeking to propound the will.*
>
> *(5) Finally (and I would suggest curiously) the court is required to consider what weight is to be given to the presumption.*

[154] As regards the final point in terms of the weight to be given to the presumption, the authorities suggest that the presumption is not rigid. On the contrary, the evidence in the case determines the strength of the presumption. Cockburn CJ in **Sugden v St Leonards** (1876) 1 PD 154 at page 217 stated that "*…the presumption will be more or less strong according to the character of the custody which the testator had over the will.*"

[155] In this case, the Court is confronted with various questions: can it be said that there is evidence of the character of the custody which Mr. Kindness had over the original Will 2? Is there any evidence of the original Will 2 being traced to Mr. Kindness in this case? If there is no evidence of the character of the custody of the testator over the original will, how do I apply the presumption or can I apply the presumption at all?

[156] Ms. Lawson invited the Court to consider the authorities of **Cooper and Ors v Chapman and Ors** [2022] EHWC 1000 Ch, **Jones v Tracey and Ors** and **Violet Nicholas v Wilbert Elliston** (unreported), Supreme Court, Jamaica, Claim No. 1992P00616, delivered on 8 April 2011.

[157] In the case of **Violet Nicholas v Wilbert Elliston** at paragraphs 25-27, Campbell J in considering the presumption that an original will which was traced to the deceased's possession and could not be located at her death considered the character of the deceased, words spoken after the will was executed and her conduct in determining how the presumption would be applied. In that case, the evidence was that the testator had kept the will in a safety deposit box at a bank and had the key in their possession and the evidence discloses that another person also had access to the box. Campbell J noted that the steps taken by the testator to secure the will prior to death as also the character of the testator together with declarations made all operated to reduce the strength of the presumption that the will was destroyed by the testator with the intention to revoke it.

[158] In **Cooper and Ors v Chapman and Ors**, there were two wills one dated the 4 June 2009 which the Claimants asserted was the last will and testament of the deceased Dr. Cooper. They sought to prove this will. In a counterclaim, Dr. Cooper's spouse asserted that Dr. Cooper executed a will on or about March 2018 a few months prior to death. The original of this latter will could not be located. However, a draft of this will was found on a computer which was used by Dr.

Cooper and produced in court. Both attesting witnesses to this will gave evidence in support of its due execution.

[159] In **Jones v Tracey & Ors**, there was evidence regarding the execution of the original will as well as evidence regarding steps taken to locate the original will. ‘

[160] All three cases are distinguishable from the case at bar. In those authorities, there was viva voce evidence given of the existence of the original will and the latter was traced to the deceased’s possession prior to death. The authorities suggest that a critical hurdle in such probate proceedings is to establish the due execution of an original will at the material time. In this case, the Claimant suggested in her Affidavit that Will 2 purports to have been prepared by an attorney. There is no evidence as regards the role played by an attorney in drafting or preparing that Will.

[161] I have considered a line of cases which suggest that there is no need to account for the whereabouts of the original will when seeking to rebut the presumption that it was revoked through destruction. However, in those cases, the case for the claimant included evidentiary material of the due execution of the will through calling attesting witnesses. This was the position in both **Patten v Poulton & Ors** (1858) 1 SW & T 55 and **Allan v Morrison** [1900] A.C 604. In the former, the court indicated that provided that the fact of an original was proved you need not establish how it was lost or destroyed.

[162] In the case of **Allan v Morrison**, the Privy Council considered and applied the presumption to circumstances where the deceased had kept his will in one of three tin boxes which were stored in a safe to which he alone had the key. Though he was an invalid, he could move around within his home and he kept the key in his trousers. In that case, the Privy Council upheld the decision of the Court of Appeal in applying the presumption and finding that it had not been rebutted. Should the Court make a similar finding here?

[163] In the case at bar, while the Claimant asserts that the copy Will 2 represents the testator’s true intentions, the evidence falls short of establishing the necessary

foundation for the Court to so find. The Claimant resided overseas and therefore could not have direct or continuous knowledge of the custody or fate of the original Will 2. Although there is evidence that a copy of the Will was delivered to Ms. Prout in or about the year 2000, there is no admissible or compelling evidence as to the whereabouts or existence of the original Will 2 at any point thereafter. Ms. Prout's testimony makes no affirmative claim that the document she received was the original, and indeed, she expressly states that she kept only a copy. Crucially, no evidence has been presented by the Claimant or any other witness establishing what efforts were undertaken to locate the original Will 2.

[164] Therefore, the Claimant has not provided any evidence that might rebut the presumption of revocation by destruction, which arises when a Will last known to be in the possession of the testator cannot be found after death. While it is true that certain similarities exist between the copy Will 2 and the later Will 1, such similarities alone cannot ground a finding that Will 2 continued to reflect the testator's intention at the time of death, nor can they establish that the original of Will 2 was not destroyed with intent to revoke it.

[165] Moreover, the Court finds no cogent or credible evidence to support a finding that the original of Will 2 remained in existence or that it was misplaced through no fault of the testator. There are many inferences which can be drawn from the evidence adduced in this trial, however, they are highly speculative and does not meet the necessary evidential and legal standard to rebut the legal presumption. There is a complete absence of testimony from any witness asserting personal knowledge of the original; therefore, the Claimant has not discharged the evidentiary burden required to admit a copy where the original is missing.

[166] In view of the above, the Court finds that the Claimant has not proven on a balance of probabilities that the copy Will 2 is a genuine copy of a Will that remained unrevoked at the time of Mr. Kindness's death. The presumption that the original was destroyed by the testator with the intention of revoking it has not been rebutted in the circumstances.

[167] However, I do not accept that it was the intention of Mr. Kindness for his Estate to fall under the laws of intestacy. The evidence, though incomplete, points to an intention to distribute his property by Will. However, the Claimant has not, at this stage, presented sufficient evidentiary material to allow the Court to permit the copy to be admitted to proof. That said, this does not prevent the Claimant from renewing the application to admit the copy Will in the proper form. There are procedures available in this jurisdiction that allow for such an application to be made, and I do not find that the Claimant is precluded from pursuing it**.**

[168] Accordingly, and guided by the overriding objective to deal with matters justly between the Parties, I must decline to grant the Orders sought at paragraphs 3, 4, 5, and 7 of the Further Amended Fixed Date Claim Form. Instead, the Court Orders that the Estate of Mr. Kindness is to be put in a state of non-administration, as if no assets have yet been distributed. This shall persist until such time as the rightful beneficiaries or legal representatives pursue and obtain the requisite grants of representation to administer the Estate in accordance with law. Justice demands neither haste nor conjecture, but fidelity to process, and it is through that process alone that the Estate shall find its lawful steward.

COSTS

[169] It is well established that costs ought to follow the event. That is that the general rule is that the losing party ought to pay the winning party’s costs. This general rule may be displaced in certain circumstances as is outlined at Rule 64.6(4).

[170] Rule 64.6(5) of the CPR permits this court to make several orders as to costs. It may order that a party pays, among other things: a proportion of another party's costs; costs relating to particular steps taken in the proceedings; and costs relating to a distinct part of the proceedings (see rules 64.6(5)(a), (e) and (f) of the CPR).

[171] The court must also be mindful of and apply the overriding objective to deal with the case justly in accordance see rules 1.1(1) and 1.2 of the CPR. The threshold

test is a high one. It is for the unsuccessful party to show the good reason for the court to depart from the general rule.

[172] I find no sufficient reason to depart from the general rule that costs should follow the event. Although the Claimant was ultimately unable to prove the copy Will to the standard required at this stage, it is material that this aspect of the claim was not actively contested by the Defendant. More importantly, the substance of the Claimant's claim has prevailed. In these circumstances, I am satisfied that the Claimant is entitled to an award of costs. However, I make an exception in respect of the hearing held on May 2, 2025. On that occasion, the Court itself identified an issue and invited submissions from both parties. In fairness, therefore, each party shall bear their own costs for that hearing.

ORDERS

[173] In light of the foregoing, the Court hereby makes the following Orders in the final disposition of this matter:

1. That this Honourable Court shall pronounce against the force and validity of the alleged last Will and Testament dated January 14, 2006, of the deceased Melvin Reid Kindness, and declare the same null and void for the reason that the alleged Will is a forgery, as the signature thereon is not the signature of the deceased Melvin Reid Kindness.

2. That the Probate of the alleged Will and Testament dated January 15, 2006 of Melvin Red Kindness, deceased, by this Honourable Court on the 27th day of August 2013 to Adlington Bruce Murray, Executor, of the said alleged Will in the estate of Melvin Reid Kindness, deceased, be called in and revoked.

3. That Orders 3, 4, 5 and 7 of the Further Amended Fixed Date Claim Form filed on December 6, 2022 are refused.

4. That in accordance with section 158 of the Registration of Titles Act, the Registrar of Titles is ordered to cancel the entries on the Duplicate Certificate of Title of the land registered at Volume 1077 Folio 58, transferring the property on transmission on August 16, 2016 and on transfer to Rosa-Lee Murray Kindness absolutely, under a Grant of Probate dated August 27, 2013 for the Last Will and Testament of Melvin Reid Kindness dated January 14, 2006, representing a transmission from the estate of the widow of Melvin Reid Kindness, Rosa-Lee Murray Kindness, to whom the said land had been transferred upon probate of the said Will, to one Brenda-Lee Curling.

5. That all assets disposed of under the revoked Grant of Probate dated the 27th day of August 2013 in these proceedings be returned to the Estate of Melvin Reid Kindness until such time as the rightful beneficiaries or legal representatives pursue and obtain the requisite grants of representation to administer the Estate in accordance with law.

6. The Registrar of Titles is therefore ordered, in accordance with section 158 of the Registration of Titles Act, to cancel the entries on any Duplicate Certificate of Titles for properties which were vested in the Estate of Melvin Reid Kindness transferring the properties on transmission absolutely to any entity, under a Grant of Probate dated August 27, 2013 for the Last Will and Testament of Melvin Reid Kindness dated January 14, 2006.

7. That the Claimant is empowered to take such steps as is necessary under the law to bring about the effect of Order #5.

8. Costs awarded to the Claimant to be taxed if not agreed, save that each party is to bear their own costs for the hearing on May 2, 2025.

9. Liberty to apply.

Sgd. A. Martin Swaby
Puisne Judge (ag)